Rajamani a/p Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01 (W)-71–03 OF 2015
MOHTARUDIN BAKI, ZAWAWI SALLEH AND ABDUL RAHMAN SEBLI JJCA
4 MARCH 2016

Land Law — Title — Sale and purchase of property — Indefeasibility of title — Transfer of land — Whether bad in law and void — Whether breached provision of National Land Code — Land purchased from imposter — Whether second purchaser bona fide purchaser — Whether solicitors acted in concert with fraudulent transaction — Whether relevant authorities conducted proper investigation before issuing replacement title — Whether replacement title bad in law — Whether capable of supporting transfers of interest in title — National Land Code

The appellant ('the plaintiff') was the registered proprietor owner of a piece of land ('the land'). The plaintiff's name had been replaced with the name of the second respondent ('the second defendant') and subsequently with the name of the first respondent ('the first defendant') in the register document of title. The original issue document of title was in the possession of the plaintiff at all material times. In addition to lodging a police report, the plaintiff also entered a private caveat on the land and proceeded to file a suit in the High Court against the first and second defendants. According to the second defendant, the land was purchased from an imposter from ('Rajamani') for a consideration of RM1.2m. The third respondent ('the third defendant'), a partner in the fourth respondent ('the fourth defendant'), was an advocate and solicitor who acted for Rajamani in the sale and transfer of the plaintiff's land to the second defendant. The fifth and sixth respondents ('the fifth and sixth defendants, respectively') were the land authorities responsible for all transactions in respect of the land while the seventh respondent ('the seventh defendant') was a legal assistant who acted for the second defendant. The judicial commissioner ('JC') dismissed the plaintiff's claim against all the defendants except for the second defendant. Despite finding the seventh defendant to be unworthy of credit and was privy to the fraud perpetrated by the second defendant, the plaintiff's claim against him was dismissed purely on a pleading point that the plaintiff's pleaded case against him was one of conspiracy with the third and fourth defendants to defraud. Hence, the present appeal. The seventh defendant, on the other hand, cross-appealed to set aside the decision of the High Court.

Held, allowing the appeal; dismissing the cross-appeal:

(1) The plaintiff acquired indefeasibility under s 340(1) of the National Land Code ('the NLC') upon registration of the land and such indefeasibility could only be defeated by any of the specified statutory grounds under sub-s (2) of the s 340 of the NLC or other grounds of equity. The plaintiff's title was never and had never been impeached by reason of s 340(2) or other grounds of equity. Since the issue document of title in the plaintiff's possession was validly issued, registered and never been rendered defeasible due to s 340(2) of the NLC or other grounds of equity, the first defendant's replacement title in respect of the land had to be void (see paras 49–50 & 53).

(2) The first defendant's replacement title being void had no legal effect whatsoever and was incapable of conferring indefeasibility. Such void title was ipso facto defeasible. The mere fact that the first defendant had purchased the land in good faith and for valuable consideration did not confer indefeasibility to its title if such title was otherwise void at inception. The only way the first defendant could have acquired valid and indefeasible title to the land was by having the land lawfully transferred to it by the plaintiff as the registered proprietor and not by some fraudster who had no title to the land (see paras 61 & 69).

(3) Subsections (1) and (3) of s 340 of the NLC does not confer title to land. Title is conferred by the state authority by way of alienation or by the registered proprietor by way of transfer. Subsections (1) and (3) merely confer indefeasibility upon registration of title. However, where the title itself was void ab initio, the registration would not confer indefeasibility and the proviso to s 340(3) would not apply to assist the first defendant. Since the plaintiff's title had not, at any point of time, become defeasible by reason of s 340(2) or other grounds of equity, it remained indefeasible and was not affected by the fraudulent transfer of the land by Rajamani to the second defendant and subsequently to the first defendant (see paras 71–73).

(4) The JC was wrong in dismissing the plaintiff's claim against the first defendant. The plaintiff had been placed in a position where she could use her title as a sword to strike down the first defendant's title and not merely as a shield to protect her own title from adverse claim. To give effect to the spirit of art 13(1) of the Federal Constitution, in a contest for title between an innocent landowner whose title was protected by s 340(1) of the NLC and an equally innocent bona fide purchaser for valuable consideration who claimed protection under s 340(3), the scales of justice must tilt in favour of the innocent landowner (see paras 75 & 77).

(5) The second defendant was liable to the plaintiff because the former was the mastermind of the scheme to cheat the latter of her land and was not a bona fide purchaser for valuable consideration. The third and fourth

defendants were negligent in failing to take all necessary steps to verify the true identity and status of Rajamani. The third defendant and by extension the fourth defendant had breached their duty of care to the plaintiff. Nevertheless, being guided by the view that a solicitor only owes a duty of care to his client and not to third parties, it was inevitable that the JC would find the third and fourth defendants not liable in negligence to the plaintiff (see paras 81, 90 & 95).

(6) The JC was wrong in dismissing the plaintiff's case against the fifth and sixth defendants purely on the ground that the plaintiff had sued the wrong party. The plaintiff's action could not be defeated due to the non-joinder of the Director of Lands and Mines Selangor as a party. The allegation of negligence and breach of statutory duty was related to the system failure rather than the negligent act of any particular officer. As a result, the fifth and sixth defendants failed to discharge their statutory duties and no one person could be singled out for these breaches of statutory duties or negligence (see paras 98–101).

(7) The seventh defendant had actual and not only constructive knowledge of the fraud committed by the second defendant and was privy to it. The seventh defendant had acted in concert with the third and fourth defendants to achieve the attestation and witnessing of the signatures of Rajamani on the agreement and the memorandum of transfer. A finding that the seventh defendant was privy to the fraud and was not a credible witness necessarily meant that the plaintiff's case against him had been proved. The fact that he did not have knowledge of the fraud because he was a junior and inexperienced litigation junior lawyer could not hold water (see paras 111 & 115–116).

[Bahasa Malaysia summary

Perayu ('plaintif') adalah pemilik berdaftar sebidang tanah ('tanah tersebut'). Nama plaintif telah digantikan dengan nama responden kedua ('defendan kedua') dan seterusnya dengan nama responden pertama ('defendan pertama') dalam daftar dokumen hak milik. Dokumen hak milik asal berada dalam milikan plaintif pada setiap masa material. Selain membuat laporan polis, plaintif juga memasukkan kaveat persendirian atas tanah tersebut dan seterusnya memfailkan satu guaman terhadap defendan pertama dan kedua di Mahkamah Tinggi. Menurut defendan kedua, tanah tersebut dibeli daripada seorang penyamar ('Rajamani') bagi balasan sebanyak RM1.2 juta. Responden ketiga ('defendan ketiga'), rakan kongsi responden keempat ('defendan keempat'), adalah peguambela dan peguamcara yang bertindak bagi Rajamani dalam jualan dan pindah milik tanah plaintif kepada defendan kedua. Responden kelima dan keenam ('defendan kelima dan keenam, masing-masing') adalah pihak berkuasa tanah yang bertanggungjawab bagi transaksi tanah manakala responden ketujuh ('defendan ketujuh') adalah pembantu undang-undang yang bertindak bagi defendan kedua. Pesuruhjaya

kehakiman ('PK') menolak tuntutan plaintif terhdap defendan-defendan kecuali defendan kedua. Walaupun mendapati bahawa defendan kedua tidak kredibel dan bertindak sebagai satu pihak dalam penipuan yang dilakukan oleh defendan kedua, tuntutan plaintif terhadapnya ditolak atas fakta pliding bahawa kes plaintif yang diplidkan terhadapnya adalah konspirsi dengan defendan ketig dan keempat untuk menipu. Oleh itu, rayuan ini. Defendan ketujuh, sebaliknya, merayu balas untuk mengenepikan keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan; menolak rayuan balas:

(1) Plaintif telah memperoleh ketakbolehan disangkal di bawah s 340(1) Kanun Tanah Negara apabila mendaftar tanah tersebut dan ketakbolehan disangkal sedemikian hanya boleh diatasi oleh apa-apa alasan statutori spesifik di bawah s 340(2) KTN atau apa-apa alasan ekuiti. Isu hak milik tidak dan tidak pernah dicabar atas sebab s 340(2) atau apa-apa alasan ekuiti. Oleh sebab isu dokumen hak milik dalam milikan plaintif telah dikeluarkan dan didaftarkan dengan sah dan tidak pernah dinyatakan sebagai boleh sangkal akibat s 340(2) KTN atau apa-apa alasan ekuiti, gantian hak milik defendan berkenaan tanah terbatal (lihat perenggan 49–50 & 53).

(2) Gantian hak milik defendan pertama terbatal dan oleh itu tidak mempunyai apa-apa kesan dan bukan tidak boleh sangkal. Hak milik terbatal sedemikian *ipso facto* boleh disangkal. Sekadar fakta bahawa defendan pertama telah membeli tanah dengan suci bagi dan bagi balasan bernilai tidak memberikan ketakbolehan disangkal pada hak milik jika hak milik sedemikian terbatal dari awal lagi Satu-satunya cara defendan pertama boleh mendapat hak milik yang sah dan boleh sangkal adalah dengan memindah milik tanah tersebut kepada plaintif sebagai pemilik berdaftar dan bukan oleh seorang penipu yang tidak punyai hak milik atas tanah (lihat perenggan 61 & 69).

(3) Seksyen 340(1) dan (3) Kanun Tanah Negara tidak memberi hak milik atas tanah. Hak milik diberi oleh pihak berkuasa negeri melalui beri milik atau oleh pemilik berdaftar melalui pindah milik. Subseksyen (1) dan (3) sekadar memberi ketakbolehan disangkal apabila hak milik telah didaftar. Walau bagaimanapun, apabila hak milik sendiri terbatal *ab initio*, pendaftaran tidak boleh memberi ketakbolehan disangkal dan proviso s 340(3) tidak terpakai untuk membantu defendan pertama. Memandangkan hak milik plaintif tidak, pada bila-bila masa, menjadi boleh sangkal atas sebab s 340(2) atau apa-apa alasan ekuiti, ia kekal tidak boleh disangkal dan tidak terkesan dengan penipuan pidah milik tanah oleh Rajamani kepada defendan kedua dan seterusnya defendan pertama (lihat perenggan 71–73).

(4) Pesuruhjaya kehakiman khilaf dalam menolak tuntutan plaintif terhadap

defendan pertama. Plaintif telah diletakkan dalam kedudukan di mana dia boleh menggunakan hak miliknya sebagai pedang untuk menumpaskan hak milik defendan dan bukan sekadar perisai untuk melindungi hak miliknya daripada tuntutan yang buruk. Untuk memberi kesan kepada semangat perkara 13(1) Perlembagaan Persekutuan, dalam pertikaian hak milik antara pemilik tanah yang tidak bersalah yang hak miliknya dilindungi di bawah s 340(1) KTN dan begitu juga, pembeli *bona fide* bagi balasan bernilai yang memohon perlindungan di bawah s 340(3), skala keadilan semestinya berpihak pada pemilik tanah yang tidak bersalah (lihat perenggan 75–77).

(5) Defendan kedua bertanggungan kepada plaintif kerana defendan kedua adalah dalang di balik skima menipu plaintif dan bukan pembeli *bona fide* bagi balasan bernilai. Defendan ketiga dan keempat cuai apabila gagal mengambil langkah-langkah yang perlu untuk mengesahkan identiti dan status Rajamani. Defendan ketiga dan selanjutnya, defendan keempat telah melanggar kewajipan berhati-hati mereka terhadap plaintif. Walau bagaimanapun, berpandukan pandangan bahawa peguamcara hanya mempunyai kewajipan berhati-hati terhadap anak guamnya dan bukan pihak ketiga, PK tidak boleh mengelak daripada membuat dapatan bahawa defendan ketiga dan keempat tidak bertanggungan dalam kecuaian terhadap plaintif (lihat perenggan 81, 90 & 95).

(6) Pesuruhjaya kehakiman khilaf dalam menolak kes plaintif terhadap defendan kelima dan keenam khusus atas alasan bahawa plaintif telah menyaman pihak yang salah. Tindakan plaintif tidak boleh diatasi akibat kegagalan menggabungkan Pengarah Tanah dan Galian Selangor sebagai pihak. Dakwaan kecuaian dan pemecahan kewajipan statutori adalah berkenaan kegagalan sistem dan bukan tindakan cuai mana-mana pegawai. Akibatnya, defendan kelima dan keenam gagal untuk melepaskan tanggungjawab statutori mereka dan tiada orang yang terlepas bagi pemecahan tanggungjawab statutori dan kecuaian (lihat perenggan 98–101).

(7) Defendan ketujuh mempunyai pengetahuan sebenar dan bukan sahaja konstruktif tentang penipuan yang dilakukan oleh defendan kedua dan privi terhadapnya. Defendan ketujuh turut bersubahat dengan defendan ketiga dan keempat untuk mendapat penyaksian tanda tangan Rajamani pada perjanjian dan memorandum pindah milik. Dapatan bahawa defendan ketujuh adalah privi kepada penipuan dan bukan saksi kredibel semestinya bermaksud bahawa kes plaintif terhadapnya telah dibuktikan. Fakta bahawa dia tidak mempunyai pengetahuan tentang penipuan tersebut kerana dia seorang *junior* dan peguam litigasi junior tidak berpengalaman tidak boleh kekal (lihat perenggan 111 & 115–116).]

Notes

For a case on sale and purchase of property, see 8(3) Mallal's Digest (5th Ed, 2015) para 5662.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241 ; [2001] 2 CLJ 133, FC (refd)
Al Sabah v Ali and others [1999] All ER (D) 49; [1999] EGCS 1, Ch D (refd)
Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136, CA (refd)
Damodaran v Vasudeva [1974] 1 MLJ 128b ; [1973] 1 LNS 19, HC (refd)
Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu & Ors [2015] 4 MLJ 543; [2015] 3 CLJ 489, CA (refd)
Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126 (refd)
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159, PC (refd)
Overseas Realty Sdn Bhd v Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] 8 CLJ 107, HC (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)
Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor [2016] 3 MLJ 365; [2015] 8 CLJ 367, CA (refd)
Penn v Bristol & West Building Society and others [1997] 3 All ER 470, CA (refd)
Ross v Caunters (a firm) [1979] 3 All ER 580, Ch D (refd)
Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors [2013] 7 MLJ 755, HC (refd)
Sivalingam a/l Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Swamy v Matthews & Anor [1968] 1 MLJ 138, FC (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81, FC (refd)
Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221; [1997] 1 CLJ 541, FC (folld)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1 ; [2010] 2 CLJ 269, FC (refd)
Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor [1996] 3 MLJ 367, CA (refd)
Wilkins & Ors v Kannammal (f) and Anor [1951] 1 MLJ 99, CA (refd)
Yap Ham Seow v Fatmawati bt Ismail & Ors [2014] 1 MLJ 645 ; [2013] 9 CLJ 577, CA (distd)

Legislation referred to

Federal Constitution art 13(1)
Government Proceedings Act 1956 ss 5, 6
National Land Code ss 12, 13, 22, 85(2), 89, 329(2), 340, 340(1), (2), (3), (3)(a), 421AA, Form 14A
Rules of Court 2012 O 15 r 6(1)

Appeal from: Civil Suit No MT2-21–136 of 2007 (High Court, Shah Alam)

Bastian Vendargon (PK Nathan, T Gunaseelan and Gene Vendargon with him) (Gunaseelan & Assoc) for the appellant.
KL Pang (Shelby Chin with him) (Cheah Teh & Su) for the first respondent.
Absent (Sankar & Co) for the second respondent.
Leong Wai Hong (David Tan with him) (Skrine) for the third and fourth respondents.
Ahmad Fuad bin Othman (Wan Nur Amanina bt Wan Din with him) (State Legal Advisor's Office, Selongor) for the fifth and sixth respondents.
Sree Harry (Mahendra Mahason and Enoveetha Baskaran with him) (Sree Harry & Co) for the seventh respondent.

Abdul Rahman Sebli JCA:

INTRODUCTION

[1] This is yet another case of land fraud resulting in the loss of property by an innocent landowner through no fault of hers. The law as it stands today appears to give greater protection to an innocent bona fide purchaser for valuable consideration than to the innocent landowner, no doubt a result of the immunity accorded to such bona fide purchaser for valuable consideration by the proviso to s 340(3) of the National Land Code ('the Land Code').

[2] In a landmark decision in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 the apex court restored the position long held before *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 ; [2001] 2 CLJ 133 that the Land Code recognises deferred rather than immediate indefeasibility.

[3] In the light of what the proviso to s 340(3) of the Land Code provides, the court's approach in resolving competing claims over land that is the subject of fraud has always been to determine whether the subsequent purchaser had acquired the land in good faith and for valuable consideration.

[4] All that such purchaser needs to do in order to keep the land as his is to convince the trial judge that he probably had no notice of the fraud perpetrated

by the fraudster. It is really that easy to lose one's land. In the present case a RM2 company was used as the engine of fraud.

[5] Although the law concerning tenure of land in West Malaysia is governed by the Land Code, equitable principles have been applied as can be seen in *Wilkins & Ors v Kannammal (f) and Anor* [1951] 1 MLJ 99 (CA), where Taylor J delivering the judgment of the court held:

> The Torrens system is a system of conveyancing; it does not abrogate the principles of equity.

[6] Likewise, in the Privy Council case of *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 Lord Russell of Killowen said:

> The Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.

[7] We had the privilege of hearing very able and forceful arguments from learned counsel for the respective parties on 28 October 2015 and 3 December 2015 and reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

[8] My learned brothers Justice Mohtarudin Baki and Justice Mohd Zawawi Salleh have read the final draft of this judgment and have approved the same. For convenience we shall refer to the parties as they were in the court below, namely the appellant as plaintiff and the respondents as defendants.

THE PLAINTIFF'S CASE

[9] The plaintiff's pleaded case was that the 'transfer' of her land to the second defendant and subsequently to the first defendant was bad in law and void for breaches of the provisions of the Land Code. We use the word transfer in parenthesis because there was no transfer of the land in the true legal sense of the word.

[10] We do not think it is open to argument that in law, it is the plaintiff and only the plaintiff as the registered proprietor who had the legal capacity to effect transfer of the land. If for any reason the transfer is null and void, any title that was acquired through such void transfer will likewise be null and void and will not be immune from attack.

[11] The plaintiff's claim, inter alia, was for the following reliefs:

(a) a declaration that she is the registered proprietor of the land;

(b) a declaration that her name be restored in the register;

(c) a declaration that all transfers of the land in favour of the first and second defendants are void;

(d) an order cancelling all entries in the register in respect of the land in favour of the first and second defendants; and

(e) damages against the defendants.

[12] The first prayer is a paradox and a contradiction in terms as the plaintiff was practically asking for her own land to be declared as her rightful property. It cannot get more absurd than that.

[13] After a full trial of the action, the learned judicial commissioner ('JC') dismissed the plaintiff's claim against all the defendants except the second defendant ('a RM2 company') and allowed the first defendant's counter-claim against the plaintiff, a classic case of 'sudah jatuh ditimpa tangga'. The English equivalent to the aphorism is to rub salt to injury.

[14] The second defendant was absent both at the trial in the High Court and at the hearing of this appeal and its counsel had also failed to turn up at this appeal. Nor did it file any appeal or cross-appeal against the decision of the High Court. Therefore the High Court decision finding the second defendant liable to the plaintiff remains intact, and this includes most importantly a finding that the transfer of the plaintiff's land was effected by unlawful means, resulting in the issuance and registration of two replacement titles, first in the name of the second defendant and subsequently in the name of the first defendant.

THE PIVOTAL ISSUE

[15] The pivotal issue in this appeal, like in all cases of like specie, revolves round the provisions of s 340 of the Land Code, which reads:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible –
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an

A insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

B (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) –

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

C (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body D claiming through or under such a purchase.

[16] The provision is clearly structured to ensure certitude in land ownership in West Malaysia, which subscribes to the Torrens system. It is intended to guarantee indefeasibility of title or interest upon registration. E

[17] It is not quite correct though to say that 'registration is everything' as indefeasibility of title is liable to impeachment under s 340(2) or under s 340(3)(a) where the purchaser for valuable consideration had not acted in F good faith or on other grounds of equity. In other words indefeasibility is not absolute.

[18] There are two situations in which indefeasibility is conferred upon registration of title. The first is under sub-s (1) of s 340 which provides for G indefeasibility generally to all registered proprietors whose names appear for the time being in the register document of title. The second is by virtue of the proviso to sub-s (3) which provides for indefeasibility specific to bona fide purchasers for valuable consideration where title to the land has become defeasible by reason of sub-s (2). H

[19] It is the second situation that has brought misery to many unsuspecting landowners, who would wake up one fine morning only to discover that their lands were gone. This is absolutely shocking to these landowners as under s 340(1) of the Land Code their titles are expressed in clear language to be I 'indefeasible', meaning to say incapable of being annulled or undone except on grounds specified in s 340(2) . It is one of the great mysteries of the law. It is therefore important to determine the true effect of the proviso to s 340(3) of the Land Code.

[20] In a recent decision of the Federal Court in *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 it was held, on the facts of the case, that the title acquired by the purchasers was defeasible notwithstanding that they were bona fide purchasers for valuable consideration without notice of the defeasible title of the vendors.

[21] The court came to this conclusion after finding that the vendors were imposters of those entitled to the estate of the deceased and therefore had no title to pass, like the fake Boonsom Boonyanit in *Adorna Properties Sdn Bhd* and, to a certain extent, the fake vendor in the present appeal.

THE FACTS

[22] The facts have been set out with admirable clarity by learned counsel for the plaintiff and they are as follows. The plaintiff, Rajamani a/p Meyappa Chettiar was the registered proprietor and lawful owner of a parcel of land known as EMR 6527 ('the land') until she was deprived of her rights over the land in what the learned JC aptly described as a 'land scam case'.

[23] What we mean by deprivation of rights is that the plaintiff's name has been replaced with the name of the second defendant and subsequently with the name of the first defendant in the register document of title, despite having possession of the original issue document of title at all material times.

[24] The first defendant, Eng Beng Development Sdn Bhd, a private limited company had 'purchased' the land from the second defendant Infinite Income Sdn Bhd and is currently holding what purportedly is a replacement title, namely GM 9890.

[25] The second defendant on its part had purportedly purchased the land from an imposter from India by the name of 'Rajamani a/p Meyappa Chettiar' ('the bogus Rajamani') for a consideration of RM1.2m. Whoever this bogus Rajamani was, and whether she was real or imaginary, it is obvious that the second defendant by using her as a decoy and with a little help from willing hands had unlawfully enriched itself at the expense of the plaintiff.

[26] The third defendant, Pushpaleela a/p R Selvarajah was at all material times an advocate and solicitor of the High Court of Malaya and was the person who acted for the bogus Rajamani in the sale and transfer of the plaintiff's land to the second defendant. She was the person responsible for attesting the signature of the bogus Rajamani in the transfer form (Form 14A).

[27] The fourth defendant, MY Choong, Pushpa & Co is the law firm in which the thirrd defendant was a partner at all material times and where she

was practicing as an advocate and solicitor.

[28] The fifth defendant, Pentadbir Tanah Daerah Klang, and the sixth defendant, Pendaftar Hakmilik Negeri Selangor Darul Ehsan, are the land authorities responsible for all transactions in respect of the land and for the maintenance and proper upkeep of all records of dealing involving the land.

[29] The seventh defendant, Sheelan Arjunan was at all material times an advocate and solicitor of the High Court of Malaya and a legal assistant in the law firm known as Messrs Omar Hussein & Co. The seventh defendant acted for the second defendant in both the first purchase of the plaintiff's land from the bogus Rajamani ('the first transaction') and the subsequent sale of the same to the first defendant.

[30] So the land had been 'sold' twice, first by the bogus Rajamani to the second defendant and then by the second defendant to the first defendant. The stage was thus set for taking advantage of the shield of immunity provided by the proviso to s 340(3) of the Land Code.

[31] It was the second defendant who introduced the bogus Rajamani to the third and fourth defendants and who requested the law firm to act for her in the first transaction. The seventh defendant and the law firm in which he was attached to acted for the second defendant (and through it the bogus Rajamani) to apply for and to obtain a replacement title to the land.

[32] The fact that the plaintiff had, at all material times, been in possession of the original manual issue document of title to the land is not in dispute. The title was produced as exhibit at the trial. She later discovered that the land had been transferred by her to the second defendant for a consideration of RM1.2m.

[33] The fraudulent transfer was effected on 25 October 2005 by the bogus Rajamani to the second defendant using a fraudulent title. A year later, on 20 September 2006, the land was transferred to the first defendant by the second defendant for a consideration of RM1.8m, using the same fraudulent title and not the original issue document of title.

[34] By this stroke of criminal ingenuity the second defendant had thus unlawfully enriched itself by RM600,000, assuming it is true that it had paid RM1.2m to the bogus Rajamani for the land.

[35] On being aware of these dealings, the plaintiff lodged a police report on 30 March 2007. She had earlier lodged a private caveat on 28 March 2007 to

protect her interest in the land. The entry of this caveat was the subject of the first defendant's counter-claim against the plaintiff, which the learned JC decided in favour of the first defendant at the conclusion of the trial, relying on s 329(2) of the Land Code and the decision of the High Court in *Damodaran v Vasudeva* [1974] 1 MLJ 128b ; [1973] 1 LNS 19 .

[36] It is important to emphasise that the plaintiff never parted with possession of the original issue document of title and had never engaged any lawyer to sell the land or to deal with it in any way whatsoever and she never signed any document for the purpose of any transfer of the land. In short she had nothing to do with the transaction involving the transfer of her land to the second defendant or to the first defendant. It was an open and shut case of fraud.

[37] It is further undisputed that neither the defendants nor their witnesses ever dealt with the plaintiff as owner of the land. All of them dealt with the bogus Rajamani, or at least that was how it was played out during the trial.

THE DEFENCES

[38] The defences raised by the respective defendants in answer to the plaintiff's claim were as follows:

First defendant – that it had good title to the land as it was a bona fide purchaser for valuable consideration, relying on the decision of this court in *Yap Ham Seow v Fatmawati bt Ismail & Ors* [2014] 1 MLJ 645; [2013] 9 CLJ 577 .

Second defendant – that it was a bona fide purchaser for valuable consideration and hence its title to the land was indefeasible.

Third and fourth defendants – that they had no duty in tort to the plaintiff and that the third defendant had complied with normal conveyancing practice in her dealings with the bogus Rajamani and that any loss to the plaintiff was caused not by her but by the fifth and sixth defendants.

Fifth and sixth defendants – that they were not properly named as parties by virtue of ss 5 and 6 of the Government Proceedings Act 1956 and that the fraud was committed by other parties and that they too were victims and had been duped into issuing the continued title to the second defendant and subsequently to the first defendant and to allow transfer of the property. They also claimed protection under s 22 of the Land Code.

Seventh defendant – that being a junior and inexperienced litigation lawyer, he had no knowledge of the fraud.

OUR DETERMINATION OF THE ISSUES

[39] We shall begin with the case against the first defendant, Eng Beng Development Sdn Bhd. Its claim to indefeasibility was by virtue of being a bona fide purchaser for valuable consideration under s 340(3) of the Land Code and not, it will be noted, by virtue of being a registered proprietor under s 340(1).

[40] The difference is not without significance because different considerations will then apply in determining the circumstances under which the indefeasibility of their titles can be defeated. The indefeasibility of title conferred by s 340(1) can be defeated by any of the statutory grounds set out in s 340(2) whereas the indefeasibility of title conferred by the proviso to s 340(3) can be defeated if the subsequent purchaser had not acquired the land in good faith and for valuable consideration.

[41] Having found that the first defendant had purchased the land in good faith and for valuable consideration from the fraudster, the learned JC quite expectedly dismissed the plaintiff's claim against the first defendant. In so deciding, it is obvious that his focus was on the proviso to s 340(3) of the Land Code. He cannot be faulted for doing so as the flow of authorities favour the view that a subsequent purchaser in good faith and for valuable consideration enjoys immunity from adverse claim to his title.

[42] It was the learned JC's finding that the first defendant had neither knowledge nor notice of the commission of the fraud by the second defendant in cahoots with the bogus Rajamani that resulted in the transfer of the land to the second defendant before it was subsequently transferred to the first defendant.

[43] On the evidence before him, we are not prepared to say that the learned JC was plainly wrong in making such finding of fact. Our reservation however is with his failure to address his mind to the critical question of whether the plaintiff's title to the land, namely EMR 6527 had, as a matter of law, passed to the first defendant in order to confer indefeasibility to the first defendant's replacement title, namely GM 9890.

[44] The question is directly connected to the issue of whether the indefeasibility of the first defendant's title, if at all, that is conferred by the proviso to s 340(3) can be defeated by the indefeasibility of the plaintiff's title conferred by s 340(1), and this is quite apart from the question of whether title

to the land is vested in the first defendant by virtue of s 89 of the Land Code. A

[45] Interest in land that can be defeated by registration is a prior unregistered interest: see *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 per Raja Azlan Shah CJ (as His Late Royal Highness then was). EMR 6527 is not such prior unregistered interest in land as it was duly registered in the plaintiff's name. B

[46] Section 89 it must be noted speaks of a document of title that is 'duly registered'. In addition to that, the conclusiveness of title under the section is expressed to be 'subject to the provisions of this Act'. It means a document of title that is duly registered in accordance and in strict compliance with the provisions of the Land Code and not otherwise. A document of title that is not so registered is not a valid document of title and is incapable of conferring indefeasibility. C D

[47] Clearly, for any transfer of land to take effect in law, the document of title used to effect the transfer must *ex necessitate* be a valid document of title. It is only upon a valid transfer of such valid document of title that the question can then arise whether the title upon registration acquires indefeasibility and is shielded from impeachment by the proviso to s 340(3) of the Land Code. The proviso does not operate in a vacuum. There must, ex post facto be a valid title in existence before it takes effect. E

[48] Lest this court be accused of attempting to turn back the clock on the adoption of the Torrens system in this country, it is necessary for us to explain that the purpose of the exercise is not to lift the veil of registration so to speak but to determine if the replacement title in the first defendant's possession, namely GM 9890 is a valid document of title vis-a-vis the plaintiff's document of title, namely EMR 6527. F G

WHETHER THE PLAINTIFF'S TITLE INDEFEASIBLE

[49] The first thing to remember with regard to the plaintiff's title is that upon registration, she acquired indefeasibility under s 340(1) of the Land Code and such indefeasibility can only be defeated by any of the specified statutory grounds of fraud et cetera under s 340(2) or other grounds of equity. It cannot be defeated by any other ground. H I

[50] None of such statutory grounds under s 340(2) or other grounds of equity exists in relation to the issuance of the plaintiff's document of title. In fact the plaintiff's title was never and has never been impeached by reason of s 340(2) or other grounds of equity.

[51] EMR 6527 therefore remains valid and indefeasible. Under the circumstances, the issuance and registration of any other title in respect of the land would be void ab initio. The reason is simply because the issuance and registration of such title would be in breach of the Land Code.

[52] Under the Land Code, each title document must relate to only one lot of land: see s 85(2). There cannot be two titles existing side by side in respect of the same parcel of land. One of them has to be void. This has to be so, for otherwise one lot will have not only two but multiple titles.

[53] Therefore, since the issue document of title in the plaintiff's possession was validly issued and validly registered and has never been rendered defeasible by reason of s 340(2) or other grounds of equity, the first defendant's replacement title in respect of the land has to be void.

[54] We find support for this proposition in the Federal Court case of *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221; [1997] 1 CLJ 541 which surprisingly was not cited to us by any of the parties to this appeal, for good reasons we presume.

[55] In that case the respondent was issued with a document of title registered in September 1968 whilst the appellant was issued with another document of title registered in December 1972, meaning to say the respondent's title was first in time to be registered. No issue of fraud was involved.

[56] One of the issues for the court's determination, which is relevant for purposes of this appeal, was whether the respondent's title, which was registered earlier, prevailed over the appellant's title. The Federal Court held in no uncertain terms that the second title registered in the name of the appellant was void against the respondent and that the indefeasibility of the respondent's title could not be challenged.

[57] It was further held, 'on another alternatively sufficient ground, apart from indefeasibility of title' that the appellant's title was also void as a document of title to land because the land could not be alienated by the state authority since it was no longer state land.

[58] Admittedly the facts of the case are not on all four with the facts of the present appeal but the fact pattern of the case fits in with the fact pattern of the case before us since both involve a single piece of land having two titles, namely EMR 6527 in the plaintiff's name and GM 9890 in the first defendant's name.

[59] We note that the position of the appellant in that case was far more favourable than the position of the first defendant in the present appeal in that the registration of his title did not involve any element of fraud. Yet his title was held to be void against the respondent, despite the fact that he was 'for the time being registered as proprietor' within the meaning of s 340(1) of the Land Code and was not guilty of any wrongdoing.

[60] The ratio decidendi of the case is clear, that the law recognises only one document of title. In the context of the present appeal, that document of title is the plaintiff's original issue document of title which, we repeat, has not been rendered defeasible by reason of s 340(2) of the Land Code or other grounds of equity. Her title to the land therefore remains indefeasible and cannot be challenged. By resisting the plaintiff's claim and counter claiming against her, the first defendant was doing just that, which it cannot.

FIRST DEFENDANT'S TITLE DEFEASIBLE

[61] Applying *Tan Chiw Thoo* to the facts of the present case, the first defendant's replacement title being void has no legal effect whatsoever and is incapable of conferring indefeasibility. Such void title is ipso facto defeasible and the first defendant cannot seek shelter behind the proviso to s 340(3) to claim indefeasibility.

[62] Indefeasibility of title must not be confused with validity of title. They are two different kettles of fish altogether. Indefeasibility of title refers to immunity from attack by adverse claim whereas validity of title refers to its legal efficacy or force. *A fortiori* the title must first be a valid title before it can acquire indefeasibility as validity is a *sine qua non* for indefeasibility.

[63] We have no doubt in our minds that s 340 of the Land Code is only intended to confer indefeasibility to valid documents of title and not to void documents that have no legal efficacy or force. It cannot be the intention of the Legislature in all its wisdom that indefeasibility is to be accorded to both valid and void documents of title upon registration. Subsection (2) makes this abundantly clear.

[64] Thus, the mere fact that the first defendant had purchased the land in good faith and for valuable consideration does not confer indefeasibility to its title if such title is otherwise void at inception. GM 9890 is clearly a void document of title as it was issued and registered during the subsistence of a valid and indefeasible document of title, namely EMR 6527.

[65] Perhaps the following observation by Peh Swee Chin FCJ delivering the judgment of the Federal Court in *Tan Chiw Thoo* at p 549 may shed some

light on the actual status of such title:

> The purported alienation to the second titleholder was a nullity, in our opinion, to such an extent on the facts of this case, that had there been a purchaser in good faith and for valuable consideration of the title of the second titleholder, for the sake of illustration, *such a purchaser would have obtained neither title nor interest of the said lot, in other words, the proviso to sub-s (3) of s 340 of the Code would not apply to assist such a purchaser*. (Emphasis added.)

[66] We appreciate of course that the above passage was said *en passant* (in passing) and that the court was concerned with alienation of land rather than with fraudulent transfer of land or with purchase of land by a bona fide purchaser for valuable consideration, but a feature of the case that stands out is that two titles were issued and registered in respect of the same parcel of land, which is exactly the case in the present appeal.

[67] The disparity in the facts does not therefore dilute the relevance of the case, especially given the fact that in our case the land was validly registered in the plaintiff's name when it was surreptitiously registered in the second defendant's name.

[68] At the risk of repetition we must reiterate that the indefeasibility of the plaintiff's title cannot be challenged other than on grounds specified in s 340(2) of the Land Code or other grounds of equity: *Tan Chiw Thoo*. It is, as we said, not simply a question of whether the first defendant had purchased the land in good faith and for valuable consideration but whether the replacement title in its possession is capable of conferring indefeasibility and overriding the plaintiff's original issue document of title.

[69] As transfer of title precedes and is a prerequisite for registration, any registration that precedes transfer can never confer title to land. That is a legal impossibility. The only way the first defendant could have acquired valid and indefeasible title to the land was by having the land lawfully transferred to it by the plaintiff as the registered proprietor and not by some fraudster who had no title to the land, having purchased it from an accessory who herself was not 'for the time being registered as proprietor' of the land. It was in fact a transfer that involved no man's land.

[70] Given the fact that the land was transferred to the first defendant not by the plaintiff as the registered proprietor but by a fraudster who had transferred it to itself from an imposter, that reduces, in our respectful view, the replacement title in the first defendant's possession to nothing more than a worthless piece of paper with no legal efficacy or force whatsoever. It is in this context that the first defendant's claim to indefeasibility by virtue of the proviso to s 340(3) of the Land Code must be looked at.

[71] It is important to bear in mind that sub-ss (1) and (3) of s 340 do not confer title to land. Title is conferred by the state authority by way of alienation or by the registered proprietor by way of transfer. Subsections (1) and (3) merely confer indefeasibility upon registration of title. But where, as in this case, the title itself is void ab initio, registration will not confer indefeasibility and the proviso to s 340(3) will not apply to assist the first defendant.

[72] The defeasible title referred to in s 340(3) presupposes a validly registered title, but which has become defeasible by reason of s 340(2). It does not refer to a title that is void ab initio, such as the 'title' that the second defendant acquired from its partner in fraud the bogus Rajamani, who was not even the registered proprietor and therefore had no title to pass at the time she supposedly transferred the land to the second defendant.

[73] Since the plaintiff's title has not, at any point of time, become defeasible by reason of s 340(2) or other grounds of equity, it remains indefeasible and is not affected by the fraudulent transfer of the land by the bogus Rajamani to the second defendant and subsequently to the first defendant by the second defendant. If her title was indefeasible then, it is indefeasible now.

[74] From the language of s 340(1) read in conjunction with s 340(2) , it is clear to us that even the first owner to whom the land has been alienated does not enjoy immediate indefeasibility. His title is liable to be impeached under s 340(2) or other grounds of equity. But unless and until that happens, his title is unimpeachable and remains indefeasible. In plain language minus the jargon, he remains the owner and retains ownership of the land to the exclusion of all others.

[75] This brings into sharp focus art 13(1) of the Federal Constitution which guarantees that no person shall be deprived of property save in accordance with law. To give effect to the spirit of art 13(1), we hold that in a contest for title between an innocent landowner whose title is protected by s 340(1) and an equally innocent bona fide purchaser for valuable consideration who claims protection under s 340(3), the scales of justice must tilt in favour of the innocent landowner.

[76] Any contrary proposition will result in unmitigated injustice to the real landowner and destroy the whole foundation of the concept of indefeasibility under s 340 of the Land Code. The first defendant as an innocent bona fide purchaser for valuable consideration is not without remedy. Its remedy lies in taking action against those who caused loss and damage to it, if any.

[77] Given the view that we take on the issue of law raised in this appeal, we

A are constrained to hold that the learned JC was wrong in dismissing the plaintiff's claim against the first defendant. It is clear that the first defendant's replacement title is not impervious to attack by reason of nullity. The plaintiff has been placed in a position where she can use her title as a sword to strike down the first defendant's title and not merely as a shield to protect her own B title from adverse claim.

[78] Our decision may appear to be in conflict with the decision of this court in *Yap Ham Seow* but this is only because the question of law posed for our determination is materially different from the questions of law posed for C the court's determination in that case.

[79] The key question of law for our determination in this appeal is whether the transfer of the plaintiff's land to any party, and any application for any D replacement title purportedly made in her name was bad in law and consequently void and incapable of supporting transfers of interest in title. This court in *Yap Ham Seow* was not called upon to specifically answer this question. The case is therefore distinguishable on the issue of law to be decided.

E THE SECOND DEFENDANT

[80] We now come to the case against the second defendant. The learned judge was satisfied beyond reasonable doubt that the second defendant had, in cahoots with the bogus Rajamani as its accessory, fraudulently caused the F transfer of the land to itself.

[81] The learned judge was convinced that the second defendant was the mastermind of the scheme to 'cheat' the plaintiff of her land and was not a bona fide purchaser for valuable consideration as claimed by it in its defence, a claim G it was not prepared to defend by absenting itself at the trial and in this appeal. The learned JC was clearly right in finding the second defendant liable to the plaintiff.

[82] Unfortunately for the plaintiff it was a hollow victory as the second H defendant is a RM2 company whose ability to pay whatever judgment sum that is due to her is doubtful. It is likely that she will end up with a paper judgment against the second defendant.

THE THIRD AND FOURTH DEFENDANTS

I

[83] As for the third and fourth defendants, the reason why the learned JC cleared them of liability was because he was of the view that the solicitor who acted for the fraudster did not owe a duty of care to the plaintiff as the real owner of the land. The other reason was that if at all they owed a duty of care

to the plaintiff, their actions did not amount to breaches of that duty of care on the ground that the bogus Rajamani had presented to the third defendant her current international passport which carried the same name as the plaintiff and the land title.

[84] First, whether the third and fourth defendants owed a duty of care to the plaintiff. The plaintiff relied on the case of *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126 in support of her contention that the third and fourth defendants failed to exercise due care and skill required of a competent solicitor undertaking conveying transactions.

[85] The third and fourth defendants on the other hand relied on *Yap Ham Seow* to support their argument that their duty of care was confined to their client (the forger) and does not extend to the plaintiff who was a stranger to their retainer. The learned JC decided to follow *Yap Ham Seow* as he felt that he was bound by the decision.

[86] The general rule is that a solicitor owes a duty of care primarily to his client but like all general rules, there are exceptions. *Ross v Caunters (a firm)* [1979] 3 All ER 580 is authority for the proposition that the duty of care of a solicitor is not limited to his client while *Penn v Bristol & West Building Society and others* [1997] 3 All ER 470 demonstrates that although a solicitor believes he is acting for someone as his client, if it is found that he was not so acting or authorised so to act, and his negligence leads to damage and loss to that someone, he is liable to that person.

[87] It is trite law that a solicitor must not represent nor act for a person without authorisation: see *Halsbury's Laws of England*, (4th Ed) Vol 44 by Lord Hailsham of St Marylebone. In *Al Sabah v Ali and others* [1999] All ER (D) 49; [1999] EGCS 1 Ferris J held as follows at p 11:

> As to the second issue, it is clear that a solicitor cannot properly act for the client unless he has instructions from the client so to act. It is the solicitor's duty to satisfy himself that he has been so instructed. If instructions come to a solicitor not from the client himself but from a third party claiming to represent the client, the solicitor needs to take special care to satisfy himself the client wishes him to act, by seeing the client personally or obtaining written confirmation from the client or taking some other step which is sufficient, in the circumstances, to show that the client wants the solicitor to act for him in the matter in question. This reflects a passage in the Law Society's Guide to the Professional Conduct of Solicitors quoted in the judgment of Judge Kolbert in *Penn v Bristol and Building Society* [1995] 2 FLR 938 ; [1996] 2 FCR 729 at p 948 of the former report. In my judgment a solicitor who fails to act in accordance with this principle will not only run foul of the rules of professional conduct but, *if he causes prejudice to the interests of the person he supposes to be his client*, even in doing something which it would be perfectly

proper for him to do if he were duly retained, he will be liable in negligence. (Emphasis added.)

[88] We consider these authorities to be good law on liability in negligence by advocates and solicitors to third parties in circumstances peculiar to the facts and circumstances of the present case. With due respect to the learned JC, he was wrong in holding that he was bound by the dictum in *Yap Ham Seow*. We agree with learned counsel for the plaintiff that the case is not authority for the blanket proposition that a solicitor never owes a duty of care to a third party. Whether a solicitor is to be held liable to a third party must depend on the facts and circumstances of each case.

[89] In fact this court in *Yap Ham Seow* looked at the totality of the evidence before coming to the conclusion that the solicitor was not negligent. Obviously the conclusion was not reached simply on the basis that in law a solicitor owes no duty of care to a third party. If it were otherwise, there would have been no necessity for the court to examine the evidence to determine whether as a matter of fact the solicitor had breached his duty of care to the third party.

[90] On the facts of the present case it is clear to us that the third and fourth defendants were negligent in failing to take all necessary steps to verify the true identity and status of the imposter, the bogus Rajamani. When the bogus Rajamani produced an Indian passport bearing No F4495077, which did not match with the real Rajamani/plaintiff's passport which bears No X205536, and gave a self-serving declaration in the 'Surat Akuan' at p 2857 of the appeal record to link the two passports, the third defendant was put to notice of the need to make further enquiries.

[91] But she chose not to, despite the glaring disparity in the passport numbers staring her in the eyes. It was a red flag that should have aroused her suspicion as to the true identity of the person who appeared before her and claiming to be the landowner. Indeed the learned JC correctly noted at para 69(ii) of his judgment as follows:

> In addition, the statutory declaration dated 20 August 2005 produced by the bogus plaintiff stating that she was the bearer of Indian passport No X205536 and reissued with anew passport No F4495077 in her present possession should also have 'rung alarm bells' at the meeting. This declaration was necessary to connect the bogus Plaintiff with the title of the Land. However the declaration is obviously self serving. It is worthless with no weight to be attached to it without the official certification by the Indian consular office or relevant public authority.

[92] Had the third defendant carried out further investigation as a prudent and reasonably competent solicitor would under the circumstances, instead of blindly accepting what was claimed by the 'vendor' as correct and genuine, she

would have discovered that the Rajamani that she was dealing with was not Rajamani the real landowner: *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136 ; *Overseas Realty Sdn Bhd v Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 8 CLJ 107 .

[93] In *Swamy v Matthews & Anor* [1968] 1 MLJ 138 , (FC) Barakbah LP in his judgment said:

> Now on the law. A man or a woman who practises a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession – be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case of *Lanphier v Phipos* (1838) 8 C & P 475; 173 ER 581 Tindal CJ laid down this principle:
>
> > Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.

[94] Careless conveyancing lawyers must bear the natural and probable consequences of their acts or omissions. The truth is, the learned JC himself acknowledged, albeit reluctantly that the third defendant was negligent when he said at para 107 of his grounds of judgment, as follows:

> The bogus plaintiff had presented to the third defendant her current passport which carried the same name as the plaintiff and the land title. However the third defendant's failure to further investigate into her identity might in my view be negligent on her part. This is because as an experienced legal practitioner, she should have been alerted to the worthless statutory declaration that necessarily linked the earlier passport of the bogus plaintiff to the land title.

[95] That effectively was a finding that the third defendant, and by extension the fourth defendant, had breached their duty of care to the plaintiff. Nevertheless, being guided by his view that a solicitor only owes a duty of care to his client and not to third parties, it was inevitable that the learned JC would find the third and fourth defendants not liable in negligence to the plaintiff.

THE FIFTH AND SIXTH DEFENDANTS

[96] With regard to the fifth and sixth defendants, the learned JC found them to be 'grossly negligent', including being in breach of statutory duty for having registered the transfer of the land despite the existence of a private caveat entered by the plaintiff's son on 1 March 2001. No cross-appeal was filed by the fifth and sixth defendants against this part of the judgment. The finding is

therefore deemed to be accepted by the fifth and sixth defendants, which means they accepted that they were liable in negligence to the plaintiff.

[97] However, despite finding the fifth and sixth defendants to be 'grossly negligent', the learned JC dismissed the plaintiff's claim against them purely on what the learned JC found to be a procedural defect, ie not naming the correct party. It was his view that the proper party to be sued should be the Director of Lands and Mines Selangor and not the fifth and sixth defendants, relying on the Federal Court case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663.

[98] We must say at the outset that the learned JC was wrong in dismissing the plaintiff's case against the fifth and sixth defendants purely on the ground that the plaintiff had sued the wrong party. First of all the point was not pleaded, resulting in the plaintiff being ambushed by the point.

[99] Secondly, under the Land Code, specifically ss 12 and 13, there are designated officers charged with the responsibility of administering the Land Code and these are the officers who should properly be named as parties and thirdly, the allegation of negligence and breach of statutory duty was related to system failure rather than the negligent act of any particular officer.

[100] We agree with the plaintiff's contention that the entire departments (fifth and sixth defendants) failed in the discharge of their statutory duties and that no one person could be singled out for these breaches of statutory duties or negligence.

[101] The same issue of naming the individual tortfeasors or the relevant officer(s) who committed the tort was raised and rejected by the High Court in *Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors* [2013] 7 MLJ 755. The decision has since been upheld by this court. In any event we are in agreement with learned counsel for the plaintiff that the plaintiff's action cannot be defeated by reason only of the non-joinder of the Director of Lands and Mines Selangor as a party.

[102] We are of the view that O 15 r 6(1) of the Rules of Court 2012 ('the Rules') should have been invoked in favour of the plaintiff. Rule 6(1) provides as follows:

> 6(1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

[103] In *Tsoi Ping Kwan v Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367 even at the appellate stage, the Court of Appeal on its own motion added a third party to the proceedings to achieve the ends of justice.

[104] The learned JC was however of the opinion that O 15 r 6(1) of the rules does not apply for the reason that he would not be able to know the identity or identities of the individual tortfeasors. The flaw in the argument is apparent because if the learned JC was in no position to know who the tortfeasors were, how would the innocent and unsuspecting plaintiff be expected to know them, given that this was a case of system failure? Clearly the odds against the plaintiff were insurmountable.

[105] The learned JC's reliance on the Federal Court case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* was, with respect, misconceived having regard to the following distinguishing factor as noted by the Federal Court:

> The four appellants are the sole parties here and if the action is dismissed against them there are no other parties against whom the case can proceed.

[106] In the present appeal there were other parties before the court but more importantly, the state legal advisor's office participated fully in the trial in defending the fifth and sixth defendants. With due respect, it is untenable and unconscionable to the extreme for the fifth and sixth defendants to rely on this technical point in an attempt to defeat the plaintiff's claim, more so when they have been found to be 'grossly negligent' by the trial court and did not cross-appeal against the finding.

[107] There can be no doubt that the negligence of the fifth and sixth defendants had contributed significantly to the 'loss' of the plaintiff's land through the fraudulent acts of the second defendant in cohort with the bogus Rajamani.

[108] The fifth and sixth defendants produced no evidence at all to show that an investigation pursuant to s 421AA of the Land Code had been carried out by any of their officers before issuing and registering the replacement titles to the second defendant, followed one year later to the first defendant. This must lead to an inference that none was carried out.

[109] As for the fifth and sixth defendants' claim of protection under s 22 of the Land Code, the learned JC found that the defence was not applicable in view of his finding that the relevant officers had not been made parties to the proceedings.

[110] It is clear that if he had found, as he should, that the provision was

applicable, his finding against the fifth and sixth defendants would have been that the fifth and sixth defendants failed to establish good faith, the effect of which is to nullify their defence of good faith under s 22 of the Land Code. This can be deduced from the following passage at para 123 of the grounds of judgment:

> The reliance on the application of s 22 requires the officers to have acted in good faith. If applicable here, the burden of proof to establish good faith rests on the fifth/sixth defendant but I again observed that the relevant officers were not call as witnesses to testify in court.

THE SEVENTH DEFENDANT

[111] Lastly, the case against the seventh defendant. It was the learned JC's finding that the seventh defendant had actual and not only constructive knowledge of the fraud committed by the second defendant and was privy to it, citing *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 as supporting authority. This finding is absolutely correct as the following circumstances show that the seventh defendant was indeed party to the fraud:

(a) he was involved in everything from dealing with the bogus Rajamani, linking her up with the third and fourth defendants, to dealing with her replacement title and facilitating the sale of the land from the bogus Rajamani to the second defendant and later for a second time from the second defendant to the first defendant;

(b) he acted fraudulently and in concert with, amongst others, the third and fourth defendants to cause the transfer of the land to the second defendant;

(c) he had possession of a printout of title GM 5066 when the sole witness for the fifth and sixth defendants testified that GM 5066 was never issued;

(d) he was involved in submitting the application for transfer of the land on behalf of the bogus Rajamani; and

(e) he was involved in other similar land disputes which have ended up in court as he himself candidly admitted under cross-examination.

[112] The learned JC also mentioned in his judgment that he had observed the demeanour of the seventh defendant and this was his finding:

> In my view, all the bizzare factors discussed above are obvious facts that were telling that something in the conveyancing transaction of the Land was amiss that smacked of fraud. I noticed that the seventh defendant had however in his testimony dismissed them as casual and nothing that aroused suspicion. I have carefully watched him and am not convinced from his facial expression and manner of answering that he actually believed what he said.

[113] However, despite finding the seventh defendant to be unworthy of credit and was privy to the fraud perpetrated by the second defendant, the learned JC dismissed the plaintiff's claim against him purely on a pleading point, ie that the plaintiff's pleaded case against the seventh defendant was one of conspiracy with the third and fourth defendants to defraud. The learned JC was not satisfied that there was such conspiracy or collusion between the seventh defendant and the third and fourth defendants.

[114] With due respect to the learned JC, this is erroneous because the plaintiff's pleaded case against the seventh defendant was not founded on conspiracy. It was founded on privy to fraud, which the learned JC himself found to have been proved against the seventh defendant. There was no plea of conspiracy to defraud in the amended statement of claim.

[115] The plaintiff's averment that the seventh defendant had acted in concert with the third and fourth defendants to cause fraudulent transfer of the land must be seen in the context of their act of obtaining the signatures of the bogus Rajamani on the agreement and memorandum of transfer. That was proved as the seventh defendant had acted in concert with the third and fourth defendants to achieve the attestation and witnessing of the signatures.

[116] Having regard to the totality of the evidence and the surrounding circumstances of the case, the seventh defendant's defence that he had no knowledge of the fraud because he was a junior and inexperienced litigation lawyer cannot hold water. In the first place, being an inexperienced junior lawyer is no excuse for being negligent unless it can be shown that he could not have known of the fraud with due diligence.

[117] But most important of all, the learned JC had found the seventh defendant to be privy to the fraud committed by the second defendant. This finding is fatal to his defence as it demolished the whole substratum of his defence of lack of knowledge and experience.

THE SEVENTH DEFENDANT'S CROSS-APPEAL

[118] At the outset of the proceedings learned counsel for the plaintiff raised a preliminary objection to the seventh defendant's notice of cross-appeal dated 5 May 2015, on the ground that it was incompetent as it seeks to set aside the decision of the High Court finding fraud against the seventh defendant and more specifically the finding that the seventh defendant had actual knowledge of the fraud and was privy to it.

[119] It was argued that a separate notice of appeal ought to have been filed by the seventh defendant, citing *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha*

Ngu & Ors [2015] 4 MLJ 543; [2015] 3 CLJ 489. The basis of the objection was that the cross-appeal does not relate directly to the appeal brought by the plaintiff. *Leisure Farm* was followed in another Court of Appeal case of *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365; [2015] 8 CLJ 367 . Incidentally my learned brother Justice Mohd Zawawi Salleh and myself were panel members in that appeal.

[120] We dismissed the preliminary objection as we were of the view that the notice of cross-appeal was proper. In any event we felt that it was more important that the case to be decided on the merits rather than on a technical defect in the notice of appeal, if at all there was any.

[121] As for the merits of the seventh defendant's cross-appeal, it is clear that his appeal is not only fact based but it also involves the question of his credibility as a witness. In para 112 above we have reproduced the learned JC's assessment of the seventh defendant's credibility as a witness. We have no reason to disturb this finding: *Sivalingam a/l Periasamy & Anor* [1995] 3 MLJ 395; *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19; *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309.

[122] A finding that the seventh defendant was privy to the fraud and was not a credible witness necessarily means that the plaintiff's case against him had been proved on the balance of probabilities.

BULLOCK OR SANDERSON ORDER

[123] In relation to the order of costs made by the learned JC, it was submitted on behalf of the plaintiff that in the light of his findings on liability in respect of the respective defendants, the learned JC should have made a Sanderson order instead of a Bullock order.

[124] According to learned counsel, it was necessary and proper for the plaintiff to have named all the seven defendants in the case as they were all involved one way or another in the transactions that resulted in the loss of the plaintiff's land. A Sanderson order would enable the first, third and fourth and seventh defendants to recover their costs from the unsuccessful defendant, namely the second defendant.

[125] In view of our decision on this appeal and cross-appeal, we do not think there is any need for us to deal with the point raised.

CONCLUSION

[126] For all the reasons aforesaid we find sufficient merit in the plaintiff's appeal to warrant interference with the decision of the High Court. In the circumstances the appeal is allowed. The whole decision of the learned JC is set aside, including his decision allowing the first defendant's counter claim against the plaintiff and we substitute it with an order in terms of the amended statement of claim against each of the defendants other than the second defendant. The seventh defendant's cross-appeal is dismissed with costs.

COSTS

[127] Costs of this appeal shall be borne by the defendants. We now invite the parties to address us on the quantum of costs to be awarded to the plaintiff.

Appeal allowed; cross-appeal dismissed.

Reported by Afiq Mohamad